IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS ZURCHER, BONANDER, DEISINGER, MARTIN AND PEARDON

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JAMES ZURCHER, Individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, JIMMIE BONANDER, PAUL DEISINGER, DONALD MARTIN and RICHARD PEARDON, all Individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A. BARRINGER, FRED MANN, EDWARD H. KOHN, RICHARD LEE GREATHOUSE, ROBERT LITTERMAN, HALL DAILY and STEVEN G. UNGAR,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney, Santa Clara County, California, and CRAIG BROWN, Deputy District Attorney,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
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OPINION BELOW

The opinion of the Court of Appeals reported at 550 F.2d 464, appears as Appendix A to the petitions for writ of certiorari; an opinion of the District Court adopted by the Court of Appeals and reported at 353 F.Supp. 125 appears as Appendix C to the petitions.[1]

JURISDICTION

The Court of Appeals' order denying the petitions for rehearing and rejecting the suggestions for rehearing in banc, appearing as Appendix B to the petitions for writ of certiorari, was filed on March 28, 1977. The petitions for writ of certiorari were timely filed, docketed in this Court on April 26 and May 16, 1977 and granted on October 3, 1977. 28 U.S.C.A. § 2101(c) (1959). The jurisdiction of this Court is conferred by Title 28, United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Civil Rights Act of 1871, 42 U.S.C., section 1983, provides in pertinent part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights,

[1]Two other opinions of the District Court not adopted by the Court of Appeals and reported at 366 F.Supp. 18 and 64 F.R.D. 680 appear as Appendices D and E to the petitions for writ of certiorari.

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. Section 1524 of the Penal Code of the State of California provides in pertinent part as follows:

> "A search warrant may be issued upon any of the following grounds:
>
> . . .
>
> 4. When the property or things to be seized consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.
>
> The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be."

4. Section 1528 of the Penal Code of the State of California provides as follows:

> "If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed

by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property or things specified, and to retain such property or things in his custody subject to order of the court as provided by Section 1536."

5. The First Amendment to the Constitution of the United States provides in pertinent part as follows:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

6. Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976), provides in pertinent part as follows:

"In any action or proceeding to enforce a provision of sections . . . 1979 [42 USC Sec. 1983] . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the costs."

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in holding that a search violated the Fourth Amendment solely because the affidavit in support of the warrant did not establish probable cause to believe that a subpoena duces tecum would be impractical?

2. Where a warrant is fair on its face and the affidavit is sufficient under current statutory and case law:

(a) Are the police officers who serve the warrant liable under Section 1983 where additional facts were not set forth in the affidavit?

(b) Is the Chief of Police, who neither knew the warrant was being sought nor participated in its execution, liable on a respondeat superior theory?

3. Was it the intent of Congress that the Civil Rights Attorneys' Fees Awards Act of 1976 be applied retroactively to services rendered prior to its effective date? If so, would it be manifestly unjust to so apply the Act to these petitioners?

STATEMENT OF THE CASE

On May 13, 1971, the Stanford Daily of Stanford, California, a student newspaper, and seven alleged members of the Daily's staff filed a complaint in the United States District Court for the Northern District of California. (App. 15-35.) The complaint, pursuant to Title 42, United States Code section 1983, sought declaratory relief, a permanent injunction, and attorneys' fees. (App. 30-31.) As defendants, the complaint named J. Barton Phelps, Judge of the Municipal Court for the Palo Alto-Mountain View Judicial District; Louis P. Bergna, District Attorney of Santa Clara County; Craig Brown, a deputy district attorney; James Zurcher, Chief of Police for the City of Palo Alto; and Palo Alto Police Officers Jimmie Bonander, Paul Deisinger, Donald Martin, and Richard Peardon. (App. 15-17.)

On October 5, 1972, without permitting depositions previously noticed by defendants,[2] the district court issued its memorandum and order granting summary judgment to plaintiffs. Declaratory relief only was granted, the Court stating its anticipation "that [the] decision [would] be honored and that an injunction [would be] unnecessary." (Petition, App. C, 36.)

At plaintiffs' request, the action against Judge Phelps was dismissed on December 15, 1972. (App. 190.)

By memorandum and order of August 10, 1973 (Petition, App. D), the district court granted attorneys' fees, and by memorandum and order of July 19, 1973 (Petition, App. E), these fees were fixed at $47,500. Judgment was entered July 23, 1974 (Petition, App. F) and notice of appeal was filed August 21, 1974 (App. 9).

The Court of Appeals filed its opinion on February 2, 1977 (Petition, App. A) adopting the district court's opinion of October 5, 1972 (Petition, App. C), and sustaining the attorneys' fees award but on a different ground than that relied on by the district

[2]On October 8, 1971, defendants noticed the taking of depositions of the plaintiffs (App. 3), but cancelled the depositions at the request of the district court to attempt a stipulation of fact (CT I, 135; CT II, 324-329, CT III, 799).

When it became apparent no such stipulation could be finalized without depositions, defendants noticed plaintiffs' depositions for a second time on June 12, 1972. (App. 3.) Plaintiffs responded with both a motion for a protective order and a motion for summary judgment (App. 4), which were heard on July 10, 1972 (App. 5). The motion for summary judgment was granted, foreclosing discovery on the merits of the case, including defendant's unanswered requests for admissions (CT I, 247-251).

court. Petitions for rehearing and suggestions for rehearing in banc were denied and rejected on March 28, 1977. (Petition, App. B.) The mandate of the Court of Appeals has been stayed pending consideration by this Court. (App. 14.)

STATEMENT OF FACTS

On Friday, April 9, 1971, members of the Palo Alto Police Department and the Sheriff's Department of Santa Clara County were called to the Stanford University Hospital to remove a large group of demonstrators. (App. 170-171, 176-177, 180-181.) After several unsuccessful attempts to persuade the demonstrators to leave peacefully, the officers forced their way through the demonstrators' barricade and into the offices of the hospital. (App. 170-183.) While the main police advance was proceeding on the west side of the building, unknown persons armed with chair legs and other weapons attacked nine officers stationed on the east side. (App. 34, 104, 174-175.) One of the nine officers was knocked to the floor and struck repeatedly on the head. (App. 174.) The Daily reported that "several policemen were beaten to the ground by demonstrators armed with clubs", one officer suffering an apparent broken shoulder. (App. 104; *see* App. 179.) All nine officers were injured. (App. 104, 179; *see,* Petition, App. C, 11.)

No police photographer was located at the east end of the hospital and most news photographers were located at the west end, the site of the main resistance.

(App. 152-153.) But Officer Peardon, who was one of the assault victims, did see at least one photographer taking photographs of the assaults from a position "directly behind the Palo Alto officers"; and, on Sunday, April 11, photographs appearing in a special edition of the Stanford Daily indicated that the Daily's photographer had been in a position where he could have photographed the assaults. (App. 34-35.)

Officer Peardon obtained a copy of the special edition and on Monday, April 12, with the assistance of Deputy District Attorney Brown, prepared a search warrant affidavit.[3] (App. 27, 33-35, 37, 152-154.) The affidavit described the assaults, stated that Peardon had seen a person photographing the assaults and described the photographs published in the Daily's special edition. (App. 33-35.)

Though not mentioned in the search warrant affidavit, Brown had specific reasons, later disclosed in an affidavit opposing summary judgment, for recommending a search warrant rather than a subpoena duces tecum. (App. 149-154.) First, almost all felony prosecutions in California are necessarily prosecuted by the complaint-information procedure, and under that procedure, no subpoena may issue until a defendant has been identified and a prosecution initiated. (App. 153-154.) Second, in a 1969 proceeding that arose out of another demonstration, Brown had sought to obtain

[3]As an eyewitness, Officer Peardon had the requisite personal knowledge to establish traditional probable cause for the warrant. It was not suggested below that he was the appropriate person to further establish the impracticality of a subpoena, nor that he was in charge of the investigation.

photographic evidence from the Daily by means of a subpoena duces tecum. (App. 149.) Two staff members had given testimony to the effect that evidence sought by the subpoena had been either misplaced or stolen. (App. 149-151.) Brown had then examined "contact sheets" produced by the Daily and concluded "that the contact sheets and/or films from which they had been produced were incomplete and that a number of photographs, in [Brown's] opinion those which would have been incriminating, had been deleted."[4] (App. 150.) Third, in policy statements published prior to April, 1971, the Daily stated that it felt "no obligation to help in the prosecution of students for crime related to political activity" and that "negatives which [could] be used to convict protestors [would] be destroyed."[5] (App. 118, 152-153.) For these reasons, Brown was of the opinion that speedy action was required to avoid destruction of crucial[6] evidence and that such action could only be accomplished by means of a search warrant. (App. 152-154.)

[4]Between the time of the 1969 proceeding and the time of the events that are the basis of this case there were numerous civil disorders in Palo Alto and on the Stanford campus. (App. 152.) But photographic evidence of crimes committed during these disorders had usually been available, without court order, from police photographers or news media other than the Daily. (App. 152.)

[5]An affidavit of a staff member filed in support of plaintiffs' motion for summary judgment asserted that the Daily's policy of evidence destruction did not apply to material covered by a subpoena; this qualification of the policy had not been contained anywhere in the published statement. (App. 84, 117-118.)

[6]The police victims were generally not able to identify the persons who assaulted them. (App. 175, 180.)

When Peardon's affidavit was prepared, it was taken before Judge Phelps. (App. 21-22.) Judge Phelps issued a warrant commanding any peace officer in the county to search the premises of the Daily for photographs of the April 9 demonstration, negatives of the photographs and any film used in taking the photographs. (App. 21-22.) The defendant officers executed the warrant at approximately 5:50 in the afternoon, searching desk tops, table tops, unlocked drawers,[1] and other relatively open areas, glancing at materials to determine whether there were pictures, films or negatives concealed among them, but not reading in whole or in part any written material. (App. 155-169.) Materials were, as much as possible, returned to the position in which they were found. (App. 158, 165, 169.) Staff members observing the search did not make any claim of confidentiality for any material.[2] (App. 158, 161, 165, 168-169.) The entire search lasted about fifteen minutes.[3] (App. 158, 162, 165, 169.) Of the materials described in the warrant, only the published photographs were found; nothing was seized. (App. 27, 43, 53; Petition, App. C, 13.)

[1]There were several locked drawers in the Daily's desks and filing cabinets; these were not opened. (App. 157, 161, 164, 168.)

[2]During the search, each police officer was closely watched by many persons who apparently were Stanford Daily staff members, photographed numerous times, and subjected to harassing comments. (App. 157-158, 161, 165, 168.)

[3]Whether any material was read was disputed but as the district court's ruling was made on plaintiffs' motion for summary judgment, the factual dispute should have been resolved in defendants' favor. See 6 MOORE'S FEDERAL PRACTICE, ¶56.27[1] (2d ed. 1974.) There is some indication in the district court's opinion that it erroneously resolved the issue in favor of plaintiffs. See Petition, App. C, 31-32.

SUMMARY OF ARGUMENT

1. The Ninth Circuit, by adopting the opinion of the district court, held that "third parties" inherently are entitled to greater Fourth Amendment protection than persons who have fallen under suspicion of criminal misconduct. Therefore, a search of the premises of a third party is "unreasonable per se", even pursuant to warrant, "unless the Magistrate has before him a sworn affidavit establishing . . . that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise 'impractical'." (Petition, App. C, 14.)

A. The district court was in error in assuming that a subpoena duces tecum can be used to achieve the same end as a warrant. First, the processes are functionally dissimilar under California law. A search warrant is needed in the initial investigatory stage to gather the evidence upon which any arrest or charge is based. A subpoena is limited to subsequent stages to procure the production of witnesses and admissible evidence at formal hearings. Second, the practicality of a subpoena cannot be tested without actually issuing it, thus losing the element of secrecy necessary in many cases to preserve the evidence and risking the dissipation of the factual bases for traditional elements of probable cause. Third, resort to a grand

jury subpoena in this case, as the district court suggested on its own, was neither shown to be factually feasible nor proven to be legally valid to implement a police investigation rather than a grand jury case. Furthermore, under California law, it would be difficult, as a practical matter, and undesirable, as a policy matter, to transfer a police investigation to a grand jury for the sole purpose of obtaining a subpoena in lieu of a search warrant.

B. The district court established neither the accuracy nor the relevance of its second assertion; *i.e.*, that 18th century search warrants were directed only to suspects. Third-party searches are prevalent today, in any case.

C. The district court erred in its third assumption that a third-party receives no meaningful protection since the exclusionary rule is not available. First, the many remedies provided under California and federal law are meaningful, particularly if the victim is a true third party since the stigma of criminal involvement does not attach. Second, California has provided a vicarious exclusionary rule allowing for suppression of evidence taken in a third party search. No additional protections were required because the third party was a student newspaper: The nonconfidential photographs were particularly described; the search was brief and narrow; and the searchers were closely observed to prevent any deviation from the confines of the warrant.

D. The district court misplaced reliance upon a Federal Rules case involving the detention of a material witness. Not only is there no precedent for the district court's rule, but the rule conflicts with settled law as to the scope of probable cause needed for a search warrant and has been rejected by state and federal courts.

2. The ruling that the police officers and Chief of Police were proper parties flies in the face of section 1983's tort background, which requires culpable fault and participation in that fault in order to state a claim and confer jurisdiction. The police officers, pursuant to judicial command, properly executed the warrant which fully comported with all of the then enunciated law concerning search warrants. Such officers were not acting independently but were acting as an arm of the court, and should be protected by both judicial immunity and the defense of good faith.

The police chief was not a proper party. He had no prior knowledge of the search and did not participate in it; furthermore, the doctrine of respondeat superior is inapplicable.

3. The legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976 does not clearly indicate a congressional intent that attorneys' fees should be awarded for services rendered years before its enactment. A retroactive application of the Act will not serve to promote its purpose to encourage challenges of civil rights deprivations. Rather, it would only serve to penalize these policemen who acted at all times in good faith. Also, retroactive application of the Act would result in manifest injustice since the police officers would be responsible for fees

stemming from actions which were perfectly legal at the time.

ARGUMENT

I

THE TRADITIONAL REQUIREMENTS THAT SEARCH WARRANTS ISSUE ON PROBABLE CAUSE TO BELIEVE SEIZABLE ITEMS ARE IN A PARTICULAR PLACE SHOULD NOT BE ENCUMBERED BY ADDITIONAL REQUIREMENTS

The Ninth Circuit adopted the opinion of the district court (Petition, App. A, 2) as to the validity of the search. The district court had framed the search warrant issue as follows:

> [A]re law enforcement agencies required to explore the subpoena duces tecum alternative before obtaining a search warrant against third parties for materials in their possession? (Petition, App. C, 14.)

The district court held affirmatively:

> For the reasons set forth below the Court holds that third parties are entitled to greater protection, particularly when First Amendment interests are involved. It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise "impractical", a search is unreasonable per se and therefore violative of the Fourth Amendment. (Petition, App. C, 14.)

Upon analysis of these reasons, the fabric of the district court's opinion disintegrates.

A. A subpoena duces tecum is not a meaningful alternative to a search warrant.

The district court's first reason was made without citation of legal authority or evidence in the record:

> The intrusion from the execution of a warrant . . . is simply "unnecessary" in most situations involving non-suspects, since a "less drastic means" [a subpoena duces tecum] exists to achieve the same end. (Petition, App. C, 22.)

The proposition that a subpoena can substitute for a warrant is open to serious doubt.

(1) The processes are functionally dissimilar.

A search warrant, unlike a subpoena, is an investigatory tool utilized at the initial state of a criminal proceeding to gather the evidence upon which subsequent steps depend.[10] It may be issued (1) when the property was stolen or embezzled; (2) when the property or things were used as the means of committing a felony; (3) when the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered; or (4) when the property or things seized consist of any item or constitute any evidence that tends to show that a felony has been

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[10] "[T]he issuance of a search warrant and the resulting search of a person and/or his premises are usually followed by an arrest and the filing of a felony charge based upon the fruits of the search. . . ." [*People v. Escamilla*, 65 Cal.App.3d 558, 563, 135 Cal.Rptr. 446 (1977).] *See, also*, THE AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 491, 509 (1975.)

committed or that a particular person has committed a felony. CAL. PEN. CODE § 1524 (West 1970). The property or things may be taken on the warrant from any place, or from any person in whose possession it may be. *Id.* It is not necessary that a warrant to search particular premises for particular property name a particular person *(United States v. Camarota,* 278 F. 388 (S.D. Cal. 1922)) and the property searched for need be described only with reasonable certainty (*United States v. Gaiton,* 4 F.2d 848 (S.D. Cal. 1925)).

In determining probable cause for the issuance of a search warrant, the question is limited, for practical reasons, to whether the affiant, at the time of his affidavit, had reasonable grounds for belief that the law was being, or had been, violated and the location of the property sought. *See, People v. Acosta,* 142 Cal. App.2d 59, 298 P.2d 29 (1956); *Arata v. Superior Court, In and For San Mateo County,* 153 Cal.App.2d 767, 315 P.2d 473 (1957).

By contrast, a subpoena is a process by which the attendance of a witness is required at the trial or a hearing preliminary thereto after the investigation is complete or well advanced. CAL. PEN. CODE §§ 1326, 1327 (West 1977); CAL. CODE CIV. PROC. § 1985 (West 1955). By subpoena duces tecum, the witness may be required to bring with him, in a criminal case, books, documents, and papers. CAL. PEN. CODE §§ 1327 (West 1977). These things must be under his control, and the witness must be bound by law to produce them in evidence. (54 CAL.JUR.2d, Witnesses § 10

(1960). These are irrelevant considerations in a search warrant context.

Unlike the search warrant which need not name a person and need specify the materials sought with only reasonable certainty, the application for a subpoena duces tecum before trial must be accompanied by an affidavit specifying the exact matters or things desired to be produced, setting forth in detail their materiality to the issues involved in the case, and stating that the named witness has the desired matters or things in his possession or under his control. *Id.* It is not an investigatory tool, for the supporting affidavit must clearly show prior knowledge that the books, papers, and documents contain competent and admissible evidence material to the actual issues to be tried. *Id.*

(2) The practicality of a subpoena cannot be tested beforehand.

Even if a subpoena duces tecum theoretically could substitute for a search warrant, its actual practicality cannot be adequately tested beforehand, a requisite for legitimate law enforcement objectives. The subpoena is issued in blank by the court or clerk; it also may be issued *ex parte* by the district attorney or his investigator. CAL. PEN. CODE § 1326 (West 1977). Objection is made *after* issuance to the production or introduction as evidence in the case. 54 CAL.JUR.2d, Witnesses § 12 (1960). If the subpoena is quashed or the materials otherwise not produced, more than likely it is too late for an effective search warrant.

(3) A subpoena provides an unnecessary prior warning.

A major drawback to a subpoena is the inherent early warning it gives that certain evidence is sought by the government. The warrant is issued without a prior adversary hearing or other notice specifically "to avoid giving warning to those in control of the place to be searched." AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Note § 220.1 (1975). The Supreme Court, speaking in the area of warrants for electronic surveillance, recognized the unreasonableness of prior announcements of purpose which could provoke the escape of the criminal or the destruction of critical evidence. *Katz v. United States,* 389 U.S. 347, 355, n.16 (1967); *Ker v. State of California,* 374 U.S. 23, 37-41 (1963).

As the Supreme Court also aptly observed in *Fuentes v. Shevin,* 407 U.S. 67, 93, n.30 (1972), the "danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice."

It does not particularly matter that no occupant of the premises is a suspect at the time the warrant is needed. In many cases, the label "nonsuspect" means only that the person's involvement in the crime has not as yet been established.

Further, the label "nonsuspect" is not synonymous with "trustworthiness." Whether a nonsuspect would destroy or simply disclaim knowledge or possession of the materials sought remains an open question, unanswerable in sufficient time or with sufficient concrete fact to prove that a subpoena would be impractical.

The present case presents an excellent example of the propensity of a third-party to sympathize with criminal suspects, even absent a familial relationship or friendship. The February 1970 editorial announcement of Daily policy asserted:

> Responding to . . . the realities of government subpoenas, the Daily staff has voted to accept the following policy for reporting meetings and demonstrations.
>
> . . . .
>
> 3) Negatives which may be used to convict protestors *will be destroyed.* We feel that a line can and should be drawn at this point between journalistic responsibility and cooperation with government authorities in protests that are often directed against the government. . . .
>
> The Daily feels no obligation to help in the prosecution of students for crimes related to political activity. . . . (Emphasis added) (App. 117-118.)

A Daily editorial published the day after the execution of the warrant reiterated this policy of noncooperation:

> It has been the Daily's *standing policy to destroy all potentially incriminating unpublished photographic material.* . . . [This policy is necessary] for a news organization to keep itself from becoming a filing service for evidence to be used in civil and criminal courts. . . .
>
> . . . The use of searches, *subpoenas, and all other forms of governmental harassment* obviously have a chilling effect on the freedom of the media. . . . (Emphasis added) (App. 119-120.)

(4) The unnecessary delays will have serious consequences.

The two additional showings required by the new rule—that is, the suspect status of someone occupying the premises or, if that is not established, then the impracticality of a subpoena—frequently will delay the issuance of warrants. Such delays could have serious repercussions since it is necessary that search warrants be executed with some degree of promptness in order that the facts upon which the initial elements of probable cause were based do not become dissipated. *See, United States v. Nepstead,* 424 F.2d 269, 271 (9th Cir. 1970).

(5) A subpoena was impractical in this case.

It is doubtful that a subpoena duces tecum was, or ever could be, practical in this case. As the affidavit of Craig Brown established, there was ample reason to surmise a subpoena would be futile, and no regular court process was available at the time. (App. 149-154.)

The district court, based on *ex parte* information, rejoined that the grand jury convened two hours after the warrant was executed and a subpoena could have been made returnable to it. (Petition, App. C, 13-14, 18, n.2.) The court erred in assuming the grand jury procedure could have been tapped to subpoena the news pictures sought. In *In re McGowen,* 303 A.2d 645 (Del. 1973), the court held invalid an Attorney General subpoena for news pictures sought to identify criminals, as in the instant case, because it "was issued to implement a routine police investigation, not

a grand jury or an Attorney General investigation." 303 A.2d at 647.

> The statutory and historical scope of the Attorney General's subpoena power may not be thus broadened. Nor may its purpose be extended or its usage delegated, absent statutory enlargement, so as to transform its original grand jury function into a police instrumentality. [*Id.*]

Similarly, in California, the grand jury functions are not coextensive with routine police investigations. A grand jury subpoena is limited to witnesses whose testimony is material in an investigation actually before the grand jury. CAL. PEN. CODE § 939.2 (West 1977). The grand jury may not receive evidence unless admissible over objection at the trial of the criminal action. CAL. PEN. CODE § 939.6(b) (West 1970).

No such grand jury investigation was in progress in this case, and we cannot merely assume, as the district court does, that the grand jury would have accepted the case or that the evidence sought would have been admissible if it did, since we cannot know the scope of the case. Moreover, it is beyond the authority of a federal court to order a state district attorney, in effect, to turn over his case to an independent body for handling.

(6) A grand jury subpoena is not a reasonable alternative.

It is unreasonable to require, as a matter of law, resort to a California grand jury subpoena in any case. The time problems are obvious. A substantial amount of time must elapse to impanel or convene a grand jury; to review the case by the criminal com-

plaint committee and to accept the investigation by the grand jury; to identify, locate, and serve the subpoenaed witness; to assemble the subpoenaed materials; and to process motions to quash and similar matters. If the evidence then is not produced or is not producible pursuant to the subpoena, opportunity for warrant acquisition may have vanished.

In addition, California has severely curtailed access to grand juries on criminal matters. The average California grand jury devotes over 85 percent of its time to civil matters. They returned indictments in 1972 constituting only 3.8 percent of all felony filings in California. JUDICIAL COUNCIL OF CALIFORNIA, 1974 REPORT TO THE GOVERNOR AND THE LEGISLATURE 30, 42 [hereinafter REPORT]. The grand jury calendar is frequently overloaded. Criminal complaint committees dislike to recommend that the grand jury hear a case absent a compelling reason why a preliminary hearing before the municipal court would not serve the ends of justice. REPORT at 43.

Further, the new rule will have an impact on persons eventually prosecuted for the crime. While a California defendant may suppress evidence illegally seized by warrant from a "third party" *(Kaplan v. Superior Court,* 6 Cal.3d 150, 161, 98 Cal.Rptr. 649, 656, 491 P.2d 1 (1971); *People v. Martin,* 45 Cal.2d 755, 759-761, 290 P.2d 855 (1955), the suppression remedy is unavailable where evidence not belonging to the defendant is produced pursuant to a "third party" subpoena *(People v. Warburton,* 7 Cal.App.3d 815, 823-824, 86 Cal.Rptr. 894, 898-899 (1970)).

B. It is not established that search warrants have involved only suspects.

The district court's second reason was a historical one:

> Second, as a historical matter the notion of search warrants has involved only those suspected of a crime . . . . (Petition, App. C, 22.)[11]

The court's three citations provide no authority for the statement.[12] Moreover, the proposition runs contrary to the oft repeated statement that the consti-

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[11]The court did not explain why this assertion, if true, is relevant to a constitutional analysis in a modern context.

[12]The court cited first the brief discussion in *Henry v. United States,* 361 U.S. 98, 100 (1959), of the colonial general warrant and writs of assistance. It is noted therein that the 1776 Declaration of Rights of Virginia and Maryland condemned general warrants which allowed the search of "suspected places," or the apprehension of "suspected persons," without naming or describing the place or person, or describing the person's offense and supporting it by evidence. Allowing police to arrest or search on suspicion with no showing of probable cause before a magistrate was deemed the "oppressive practice" to be prevented. Around the time the Fourth Amendment was adopted, the decisions held that rumor, suspicion, or even "strong reason to suspect" were not adequate to support an *arrest* warrant; more of a showing was required. Taking all of this together, one cannot distill a general principle that *search* warrants, as opposed to arrest warrants, involved only suspected *persons.*

The court's second citation to KAPLAN, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474, 475-477 (1961) adds nothing: A general history of search warrants from early common law, where they were unknown, through presently-recognized grounds for their issuance. The closest relevant reference is that, during the earlier years of our country, search warrants could not issue to discover evidence of a crime unless the evidence happened to fall into certain restricted categories, such as contraband. The "mere evidence" rule is now discarded as a general principle.

The district court's quotation from *United States v. Poller,* 43 F.2d 911, 914 (2nd Cir. 1930) is taken out of context, is incomplete, and does not support the proposition.

tutional provisions make no distinction between the guilty and the innocent; the Fourth Amendment protects the innocent as well as suspects. See, for example, *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 356-357 (1931); *People v. Cahan,* 44 Cal.2d 434, 439, 282 P.2d 705 (1955).

C. A search warrant does provide meaningful protection to a third party, even when First Amendment interests are involved.

The district court's third and major point was a policy consideration:

> Third, if law enforcement agencies were not required to first explore the subpoena alternative in third-party situations, a third-party would receive no meaningful protection against an unlawful search, and there would be the rather incongruous result that one suspected of a crime would receive *greater* protection against unlawful searches than a third party. . . . (Petition, App. C, 23.)

The court reasoned as follows: The suppression of illegally obtained evidence is the chief remedy against an unlawful search. Its basic purpose is as a deterrent,[13] and no other meaningful remedy exists for the victim of an unlawful search. A third-party "does not have the protection or deterrent of the exclusionary

[13]It has been pointed out that there is no convincing evidence that the exclusionary rule actually tends to prevent unreasonable searches and seizures. See the discussion of the efficacy of the exclusionary rule in *Stone v. Powell* (1976) 428 U.S. 465, 492, n.32, 493, n.34.

rule, for by definition," he is not about to be tried for a crime." Therefore, an additional safeguard is necessary to protect his Fourth Amendment rights. That protection is the obligation of law enforcement to use a subpoena duces tecum unless it is shown to be impractical. (Petition, App. C, 22-25.) This syllogism is fallacious since the major premises are untrue.

(1) Other meaningful remedies do exist.

California officers may be sued in either the federal court or state court for damages or for an injunction under Section 1983 if their conduct violates a person's Fourth Amendment rights. *See, Monroe v. Pape,* 365 U.S. 167 (1961). They also may be sued under the criminal provisions of the federal Civil Rights Act, 18 U.S.C.A. §§ 241, 242 (1970) if the requisite "purpose to deprive a person of a specific constitutional right" is present. *See, United States v. Price,* 383 U.S. 787 (1966).

A person who maliciously and without probable cause procures the issuance of a search warrant is liable civilly for malicious prosecution as well as criminally under California Penal Code, Section 170 (West 1970). 17 CAL.JUR.3d, Criminal Law § 380 (1975).

Either under statutory provisions or under the principles of the general law, the victim may have a civil action against the offender for damages for tres-

[14]The district court failed to recognize in its analysis of "third party" situations that a person who appears to be a nonsuspect at the outset of an investigation may well become the criminal defendant. This is particularly true in situations, such as the instant case, where the items sought are intended for use in identifying the perpetrator of a felony.

pass, and is entitled to recover his property other than contraband, together with damages for its detention or destruction. 17 CAL.JUR.3d, Criminal Law §§ 377, 378, 379, 381 (1975).

Every public officer who seizes any property without authority is guilty of a misdemeanor. CAL. PEN. CODE § 146 (West 1970). An officer making an unlawful search of the person may also be liable to criminal prosecution for false imprisonment. CAL. PEN. CODE § 236 (West 1970).

The victim of an unlawful search may file a complaint seeking to invoke disciplinary action against an offending officer. 44 CAL.JUR.2d, Searches and Seizures § 52 (1958).

It is also a crime in California to open, read, or publish wilfully and without authority a sealed letter (CAL. PEN. CODE § 618 (West 1970)) or a telephonic or telegraphic communication addressed to another (CAL. PEN. CODE § 637.1 (West 1970)). Civil damages for a violation of the latter is $3,000 or treble actual damages, whichever is greater. CAL. PEN. CODE § 637.2 (West 1970).

Finally, where a magistrate acts without jurisdiction in issuing a warrant, as by failing to comply with the preliminary requisites or by issuing a general warrant, the magistrate may be liable in trespass to the injured party. 17 CAL.JUR.3d, Criminal Law § 380 (1975).

In assessing the meaningfulness of these state and federal remedies, three things must be kept in mind.

First, unlike the exclusionary rule, they *do* afford direct vindication of Fourth Amendment rights and, in most cases, significant monetary recompense to the victim. Second, unlike the exclusionary rule, the remedies are generally available even if no evidence is seized or the seized materials are not needed for a conviction. Third, if the victim is truly an innocent third-party, the "prejudice against 'criminals'" cited as the major fault of remedies other than the exclusionary rule (*see, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 423 (1971) (Burger, J., dissenting)) simply does not exist.

(2) A third-party search does have the deterrent protection of the vicarious exclusionary rule.

The California Supreme Court has adopted the rule that the legality of a search and seizure may be challenged by anyone against whom evidence from the search and seizure is used, regardless of his lack of interest in the premises searched or in the property seized, and despite the fact that his own constitutional rights have not been violated. *People v. Martin,* 45 Cal. 2d 755, 290 P.2d 855 (1955); *see, also, Keplan v. Superior Court,* 6 Cal.3d 150, 161, 98 Cal.Rptr. 649, 491 P.2d 1 (1971); WITKIN, CALIFORNIA EVIDENCE § 76, pp. 72-73 (2d ed. 1966); 17 CAL.JUR.3d, Criminal Law § 331 (1975).

California also follows the federal role in excluding from evidence any secondary fruits of an unlawful search and seizure, and excludes, additionally, mental

impressions as well as material things seized. 17 CAL. JUR.3d, Criminal Law § 334 (1975).

(3) No additional protections are required for newspapers.

We do not disagree with the district court's proposition that the magistrate should consider whether First Amendment interests are involved. (Petition, App. C, 28.) This proposition, however, does not dictate the radical rule espoused by the district court in this case.

In *Marron v. United States*, 275 U.S. 192, 196 (1927), this Court pointed out that the requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Thus, in cases involving newspapers, as in this case, the materials should be described with exacting particularity; the search should be narrowly confined to the limits of the warrant; and the warrant should be executed during business hours so that the acts of the officers can be observed.

D. There is no recognized legal authority for the third-party ruling.

(1) The district court cited no persuasive authority.

The district court's final reason was by analogy to a federal rules case concerning detention of a material witness rather than a state search warrant situation:

> A fourth factor supporting the requirement for the subpoena duces tecum alternative unless 'impractical' is the *Bacon* case .... As plaintiffs have argued [by analogy], if one not suspected of a crime cannot be *arrested* unless there is probable cause to believe that a subpoena is impractical, one not suspected of a crime cannot be *searched* unless there is probable cause to believe that a subpoena duces tecum is impractical.[15] (Petition, App. C, 25-26.)

The district court misread *Bacon* and its applicability to a state search warrant case. In holding the detention of Bacon under a federal material witness arrest warrant invalid, the Ninth Circuit reasoned as follows: A federal district court may compel the performance of a witness' duty to testify before a federal grand jury. The actual power to detain a material

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[15]In a footnote the court stated, "On the point that searches historically have been more protected than arrests, see generally, *Kaplan, op. cit.*" (App. C, 26.) The same point is put forward at page 20 as a justification for extending the *Bacon* "rule" to the instant case.

The court clearly erred in its reading of the text authorities cited. *Kaplan* only noted that more attention had been focused on search situations than arrest situations in the Eighteenth Century:

> [A]lthough the [fourth] amendment encompasses arrest as well as search, its history shows that the founders of the Republic were much more concerned with freedom from arbitrary search than from arrest. [KAPLAN, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 475 (1961).]

Kaplan opines that there is actually "little to choose" between the two in terms of indignity. *Id.*

Orfield's article is even further from the point. A 59-page compilation of law on federal arrest warrants with scant mention of search warrants, there is no discernible support for the court's statement. *See*, ORFIELD, *Warrant of Arrest and Summons Upon Complaint in Federal Criminal Procedure*, 27 U. CIN. L. REV. 1 (1958).

witness was inferrable from Rule 46(b) and Section 3149 providing for bail and conditions of release. The statutory preconditions for imposing either bail or conditions of release was a showing by affidavit (1) that the testimony of the person is material in a criminal proceeding, and (2) that it may become impracticable to secure his presence by subpoena. By analogy to traditional search warrant and arrest warrant situations, the Ninth Circuit indicated these two statutory preconditions thus constituted the requisite justification for arrest under the Fourth Amendment. By further analogy, the Court stated the judicial officer issuing the warrant, not merely the federal officer drafting the complaint, must have probable cause to believe the two preconditions exist; *i.e.*, the conclusory statements in the *Bacon* complaint for the warrant were not sufficient since the magistrate was not apprised of the underlying facts and circumstances.

The Ninth Circuit understandably did not address itself to the further issue of whether it would find a requirement for such a showing in the absence of the specific directives in the enabling legislation[16] or, if so, whether on a constitutional basis or under the Court's supervisory power over the federal system.

Nor did the Court go the further step of determining whether such requirement legitimately could and

[16]The district court appeared to be of the opinion that the Ninth Circuit had answered the question *sub silentio*. The district court said:

> that the courts read the Federal Rules of Criminal Procedure as implementing Fourth Amendment protections, and a rather strong presumption exists that the procedures mentioned in

should be imposed on state search warrants. We think they should not. While the Fourth Amendment covers seizures of both persons and objects, "it does not follow that the test of propriety with respect to the two subjects has been or should be precisely the same." *United States v. Hall*, 348 F.2d 837, 841 (2d Cir. 1965).

The district court admitted that:

> neither the Court nor the parties have come across any case which discusses the problem of when law enforcement agencies must use a subpoena duces tecum rather than a search warrant . . . .[17] (Petition, App. C, 14.)

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the Federal Rules are required by the Fourth Amendment. See *Giordenello v. United States*, 357 U.S. 480, 485 (1958). *Jones v. United States*, 357 U.S. 493 (1958) . . . . (Petition, App. C, 19.)

We believe the court was in error. Neither case suggests that the federal rules *interpret* the constitution vis-a-vis general applicability to state procedures.

The federal rules neither add to, nor detract from constitutional provisions in a general sense. For example, Rule 41 embodies standards conforming with the requirements under the Fourth Amendment but is not coextensive therewith but more specific and stringent. Violations of Rule 41 do not in and of themselves amount to violations of the Fourth Amendment. *United States v. Haywood*, 464 F.2d 756 (D.C. Cir. 1972).

By the same token a state search warrant need not meet all requirements of Rule 41 to be constitutional. *United States v. Harrington*, 504 F.2d 130 (7th Cir. 1974); *United States v. Sellers*, 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908.

[17]The district court acknowledged that three warrantless cases relied upon by plaintiffs concerning Fourth Amendment rights of third parties generally were inapposite. (Petition, App. C, 15.) In fact, the court admitted that:

> *Newberry* [*v. Carpenter*, 107 Mich. 567 (1895)] could be read to permit a third party search with a warrant . . . . (Petition, App. C, 15.)

Although the court itself placed no specific reliance on the other two cases, it did assert that they "indicate that a search of a third party even with a warrant will not satisfy the requirements of the Fourth Amendment." (Petition, App. C, 15.) The court read

It would appear, however, that *warrantless* searches are the norm in third-party cases. Warrantless searches are permitted in those instances where prompt inspections are required; even administrative areawide search warrants need not be confined to cases in which the inspector possesses probable cause to believe a particular dwelling contains a code violation. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

In California, warrantless predeparture screening of all airline passengers and carry-on baggage has been held reasonable. The California Supreme Court found support under the Fourth Amendment in the series of United States Supreme Court decisions relating to administrative searches, starting with *Camara* in 1967. *People v. Hyde*, 12 Cal.3d 158, 165, 115 Cal.Rptr. 358, 524 P.2d 830 (1974).

Warrantless searches without probable cause also are permitted of various regulated businesses (*United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *People v. Conway*, 42 Cal.App.3d 875, 891, 117 Cal.

far too much into these two state cases. In *Owens v. Way*, 82 S.E. 132 (Ga. Sup. Ct. 1914), it was held that a municipal officer had no power to take the iron safe of B from B's premises without a search warrant as incident to the arrest of A. In any case, it is not clear that B in the *Owens* case was a third party, since his safe was thought to contain contraband liquor. The crime in question was the purchase of the whiskey from B's clerk on B's premises with the approval of B's nephew A, against whom the evidence was sought.

Similarly, *Commodity Mfg. Co. v. Moore*, 198 N.Y.S. 45 (1923) involved the warrantless seizure of evidence, incident to an arrest, which disclosed a motive for arson. The documents were not subject to seizure, even under warrant, not because they belonged to someone other than the arrestee but, rather, because they constituted "mere evidence".

Rptr. 251 (1974); *People v. Grey*, 23 Cal.App.3d 456, 100 Cal.Rptr. 245 (1972); *People v. Lisner*, 249 Cal. App.2d 637, 57 Cal.Rptr. 674 (1967)), persons and objects crossing our international borders (*Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966); *Witt v. United States*, 287 F.2d 389 (9th Cir. 1961)), and vehicles in certain instances (*Harris v. United States*, 390 U.S. 234 (1968); *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1965)).

By analogy to this long line of warrantless, third-party searches, it follows that a search pursuant to a narrowly-drawn warrant is more than adequate to meet Fourth Amendment concerns.

(2) The ruling conflicts with established precedent.

In order to avoid duplication of argument, we refer to the brief of Petitioners Bergna and Brown relative to the point that the third-party search holding is in direct conflict with precedent. We note in addition that this Court specifically said in *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967) that a search for items in a regular criminal investigation "is 'reasonable' when there is 'probable cause' to believe that they will be uncovered in a particular dwelling."

In the instant case, the warrant complied with settled interpretation of the Fourth Amendment's probable cause requirement. Plaintiffs must persuade this Court of the wisdom and necessity to follow a contrary course. They have not persuaded the Sixth Circuit, which forthrightly rejected the third-party ruling in its entirety:

Appellants argue that as ". . . innocent and uninvolved third parties, [they] were deprived of their Fourth and Fifth Amendment rights due to failure of the government to utilize a subpoena *duces tecum* or demonstrate its impracticality before applying for a warrant to search safe deposit box # 127." Once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime. The necessity that there be findings of probable cause as to two factors—the commission of a crime and the location of evidence—affords protection from unreasonable searches and seizures, which are the only ones forbidden by the Fourth Amendment. We are not persuaded that the contrary rule adopted by the district court in *Stanford Daily v. Zurcher*, 353 F.Supp. 124 (N.D. Calif. 1972), is required by either the Fourth or Fifth Amendments or the Federal Rules of Criminal Procedure. [*United States v. Mfrs. Nat. Bank of Detroit, Livernois-Lyndon Streets, Safety Deposit Box #127, Detroit, Mich.*, 536 F.2d 699, 702-703 (6th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).]

See also *State v. Tunnel Citgo Services*, 149 N.J. Super. 427, 374 A.2d 32, 35 (1977), quoting the *Manufacturer's* case with approval.

II

SECTION 1983 LIABILITY WAS ERRONEOUSLY EXPANDED TO INCLUDE PERSONS WITHOUT FAULT OR INVOLVEMENT IN THE EVENTS GIVING RISE TO THE ALLEGED CIVIL RIGHTS DEPRIVATION

In order to state a Section 1983 claim, a plaintiff must plead and prove a deprivation of a constitutional right by a defendant who is acting under color of state law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Such pleading and proof is necessary to confer jurisdiction on a federal district court and such a case must be analyzed in accordance with tort principles. *Pierson v. Ray*, 386 U.S. 547, 556 (1967); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Bowens v. Knazze*, 237 F.Supp. 825 (N.D. Ill. 1965). Accordingly, for judgment to be rendered against these petitioners, it must be shown that they breached a duty owing to these plaintiffs. Stated another way, it must be shown that they acted in violation of some law to the plaintiffs' deprivation. Such a showing was never made herein. Rather, the facts demonstrate that these petitioners acted in full compliance with the then existing law in the area of search and seizure pursuant to warrant.[18]

Officer Peardon breached no duty owed to these plaintiffs by his act in signing the affidavit in question.

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[18]California law relative to search warrants is found in California Penal Code, Sections 1523, *et seq.* Section 1525 requires the submission of an affidavit which must contain facts to establish probable cause as set forth in Sections 1524 and 1527. Section 1528 provides that the search warrant then issuing will command a peace officer to search the person or place named and Section 1529 prescribes the form of the warrant.

The truth of the matters contained in his affidavit has never been disputed. He did not violate any constitutional right of these plaintiffs by signing a truthful statement of facts, but rather was performing his duty. No case has been found which holds that this act alone could in any way give rise to a Section 1983 violation. Accordingly, no jurisdiction could be conferred on the district court as to Peardon for signing the affidavit.

As to the police officers who executed the warrant, including Peardon, it cannot be said that they, in their official or personal capacities, violated any duty owed by them to the plaintiffs. They were in the process of executing a judicial order[19] and were not acting independently. Their actions in execution were the direct acts of the Court; such officers being an arm of the Municipal Court in this context. *Salvati v. Dale*, 364 F.Supp. 691 (W.D. Penn. 1973). Accordingly, they could not be held to have violated any civil rights of the plaintiffs herein. So long as they acted to carry out the judicial functions of the Court in executing a warrant fair on its face, no claim under Section 1983 may be stated against them whether it be for damages, injunction or equitable relief. *Steinpreis v. Shook*, 377 F.2d 282, *cert. denied*, 389 U.S. 1057; *Rhodes v. Houston*, 202 F.Supp. 624 (D. Neb.), *affirmed*, 309 F.2d 959, *cert. denied*, 383 U.S. 971.[20]

[19]The issuance of a search warrant in California is a judicial act and constitutes an adjudication that probable cause exists for the search. *Arata v. Superior Court, In and For San Mateo County*, 153 Cal.App.2d 767, 315 P.2d 473 (1957).

[20]*Rhodes v. Houston, supra*, involved a prayer for damages and injunction. At page 636, the Court considered the limited immunity of law enforcement officers, but then stated: "Nonetheless, authorities performing orders issuing from a court are provided immunity when they do nothing other than perform such orders." *Steinpreis v. Shook, supra*, placed reliance on the fact that the sheriff's duties were mandatory in carrying out court orders. California Code of Civil Procedure, Section 262.1 makes the execution of a search warrant mandatory on the officer receiving it and also provides that the officer is justified in its execution whatever may be the defect in the proceedings upon which it issued.

Considerable authority now holds that judges, acting within their judicial function, are absolutely immune from civil suits under Section 1983, including actions for damages as well as injunctive and/or declaratory relief. *Mackay v. Nesbitt*, 285 F.Supp. 498 (D. Alaska 1968), *affirmed*, 412 F.2d 846 (9th Cir. 1969), *cert. denied*, 396 U.S. 960; *Atchley v. Greenhill*, 373 F.Supp. 512 (S.D. Tex. 1974), *affirmed*, 517 F.2d 692, *cert. denied*, 424 U.S. 915; *contra*, *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1974), *but see Hill v. McClennan*, 490 F.2d 859 (5th Cir. 1974); *Mirin v. Justices of Supreme Court of Nevada*, 415 F.Supp. 1178 (D. Nev. 1976); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974).[21] Accordingly, if the judge who issued the warrant in question did so within his judicial function, then his actions and those who carried out his command are protected by the principle of judicial immunity from any type of Section 1983 claim and jurisdiction is lacking as to such persons. It is clear that the judge in this case acted within his judicial function and equally clear that the

[21]Of course, it has long been established that judges are immune from damage awards under Section 1983; Section 1983 being held not to have abrogated the long standing doctrine of judicial immunity. *Pierson v. Ray, supra*, at 555.

police officers acted pursuant to his order and are thereby protected."[11]

To make a contrary holding would totally disrupt the functioning of courts and police officers, for police officers would have to scrutinize and question every warrant given to them. They would find themselves in an untenable position of being compelled to refuse to execute a warrant (and be penalized for their non-compliance) or of executing the warrant and being held liable for a violation of Section 1983 as occurred in this case. Such a position is unfair for a police officer does not have the training of a lawyer and is not expected or allowed to determine whether a search warrant regular on its face is invalid. *Pierson v. Ray,* 386 U.S. 547; *Bowens v. Knazze,* 237 F.Supp. 826 (N.D. Ill. 1965).

Also, it should be pointed out that no showing was ever made that these police officers knew, or should have known, that the procedure followed in applying for the warrant was improper. Nor was a showing made that they knew, or should have known, that the warrant itself was in fact violative of plaintiffs' rights.

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[11]Petitioners also maintain that police officers who do not act pursuant to judicial order but who believe, in good faith, that their conduct is proper are entitled to present a defense of action taken in good faith even in Section 1983 cases involving a prayer for relief other than damages, where the constitutional question is one of first impression. This is grounded on the judicial premise that a police officer is not expected to be able to predict the future course of constitutional law, *Pierson v. Ray, supra*; nor is a police officer to be penalized for his actions where the constitutional standard has yet to be articulated by the courts. *Bowens v. Knazze, supra.* The deprivation of this defense will have a harmful effect on effective law enforcement, for it will result in indecision from fear of retribution.

Indeed, such a showing could not have been made since the warrant fully complied with all of the then known constitutional and statutory requirements. Therefore, there is no basis for a finding that these police officers violated plaintiffs' rights through any independent action of their own. Accordingly, none of the police officers breached any duty owing to these plaintiffs under Section 1983 and there was no jurisdiction in the lower ocurts to find such.

Finally Police Chief Zurcher was not a proper party to this lawsuit since it is clear that there can be no respondeat superior liability under Section 1983. *Rizzo v. Goode, supra; Milton v. Nelson,* 527 F.2d 1158 (9th Cir. 1976). Rather, personal involvement through prior knowledge and/or acquiescence is needed at a minimum for jurisdictional purposes.

No personal involvement or prior knowledge of the securing of the warrant and its execution was alleged as to Chief Zurcher. Plaintiffs did not rectify this situation in their subsequent motion for summary judgment, for they did not submit any affidavits in support thereof showing any personal involvement or prior knowledge on Chief Zurcher's part.

Yet the Ninth Circuit (Petition, App. A, 2), states that it will hold him as a defendant to "enjoin [him] from . . . permitting [his] subordinates from engaging in such illegal conduct in the future." Such reasoning is faulty. A declaratory judgment concerning past acts was rendered against him. Injunctive relief was denied. Further, there was no showing he permitted any illegal conduct in the first instance.

The cases of *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969) and *Hernandez v. Noel*, 323 F.Supp. 779, 783 (1970) relied upon by the Court are not on point. (Petition, App. A, 2.) In both cases, the governmental officials had knowledge of the unconstitutional conduct of their subordinates and failed to prevent a recurrence of such misconduct, thus arguably justifying the imposition of injunctive relief. In this case, not only is such knowledge and failure to act absent, but injunctive relief was denied. (The supposed threat of future violation mentioned in Footnote 1) is inapplicable to the Chief and the other police petitioners in any case since it is derived solely from the pleadings of their co-defendants.)

Accordingly, jurisdiction was lacking under Section 1983 as to Chief Zurcher and the other police officers.

III

THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 SHOULD NOT BE RETROACTIVELY APPLIED IN GENERAL OR IN THIS CASE

The decision of the Ninth Circuit recognized that *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975) did away with the legal basis (private attorney general doctrine) for the fee award given to plaintiffs by the district court, which fees were initially awarded August 10, 1973."

"In order to avoid duplication in the printing of this brief, police officer petitioners refer to the arguments contained in Petitioners Bergna's and Brown's brief relative to attorneys' fees and adopt them herein; namely, that the Act does not abrogate the absolute immunity afforded to judges and those who carry out their orders, that there is no threshold congressional authorization which allows a Section 1983 suit to be brought against a public entity, and that abrogation of the absolute immunity afforded to judges and those who carry out their orders would exceed the permissible scope of Section 5 of the Fourteenth Amendment.

While the decision of the district court was pending on appeal, Congress enacted Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976) authorizing attorneys' fees, in the court's discretion, to the prevailing party in Section 1983 cases. The Ninth Circuit then held that such new law applied retroactively to the instant case not only from the standpoint that this case was pending at the time of enactment, but also for services rendered in the district court long before the effective date of the new law. (Petition, App. A, 4, 5, 6.)

The Act does not state on its face whether it is to be applied retroactively. The decision of the Ninth Circuit reviewed the legislative history and found, without adequate basis therein, that the new law revalidated the fees awarded for services rendered some three years before the effective date. The Court pointed to 122 Cong. Rec. 17052 (daily ed., September 29, 1976) for the principle that the new law would not only operate on cases filed after its effective date, but would also apply to pending cases. However, this history also states that the Act is retroactive only to the extent of pending cases being capable of fee awards and does not in any way *clearly state* that fees should be awarded for services rendered long prior to its effective date.

If the purpose of the Act is to encourage enforcement of citizens' civil rights, Senate Report No. 94-1011, it is submitted that retroactive awards of attorneys' fees for services rendered long before the enactment of the Act would not serve the purpose of encouraging future challenges of alleged deprivations of civil rights. *Johnson v. Combs*, 471 F.2d 84 (5th Cir. 1972).[24] As stated in *Johnson*, at p. 87:

> Under these circumstances, a retroactive application of this statute would punish school boards for good faith action in seeking the guidance of the courts to determine what was required of them. Furthermore, retroactive awards of attorney's fees for these past years of litigation would not serve the purpose of encouraging future legal challenges of segregated school systems. The inconclusive legislative history of Section 718 furnishes no basis for inferring that Congress intended this provision to be given such a sweeping effect.

The police officers herein acted in good faith in the execution of the search warrant pursuant to court order. To hold them responsible for attorneys' fees of $47,500.00 for services rendered more than three years before the Act's effective date would not serve to carry out the purpose of the Act. Rather, such application would only serve to punish them.

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[24]Admittedly, *Johnson v. Combs, supra*, was decided before *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974). However, the reasoning in *Johnson* is persuasive on effecting the Congressional purpose for any future civil rights deprivations as contrasted with past acts, and we ask the Court to consider it; especially since the instant case involved a question of first impression and the police officers executed a warrant fair on its face.

The decision of the Ninth Circuit was further in error in that it did not consider the rule of not applying new legislation retrospectively where "manifest injustice" would result as discussed in *Bradley v. The School Board of the City of Richmond*, 416 U.S. 696 (1974).

According to *Bradley, supra*, 416 U.S. at 718, the Court must consider whether applying new law retrospectively to pending cases would result in "manifest injustice" and if so such application should not be had. In determining if such injustice occurs, the court looks to the (a) nature and identity of the parties, (b) the nature of their rights and (c) the nature of the impact of the change in the law upon those rights.

Applying the new attorneys' fees law to the instant case clearly results in manifest injustice. The instant parties are individuals and are not publicly funded governmental entities or classes of persons as found in *Bradley*. The search complained of was a one-time brief occurrence and was not a day-to-day activity whereby the parties had an ongoing and frequent relationship. Furthermore, the parties had equal respective abilities to present and protect their interests.

As to the nature of the rights of the parties, the petitioners had a strict duty and right to perform the search that was commanded by the warrant since the warrant was regular on its face and fully comported with applicable warrant law at the time the warrant

was actually issued and the search conducted. In fact, petitioners would be subject to contempt charges had they not executed the warrant. At such time, petitioners were not subject to impositions of attorneys' fees for conducting lawful searches and had the right to perform their duties without such sanction. To now impose fees upon them for performing duties legal at the time would be to deprive them of the right to rely upon law dictating their actions and for which no sanction existed.

As to the nature of the impact of the change in the law upon the existing rights of petitioners, it should be pointed out that the new law presents new and unanticipated obligations upon these petitioners. For how were these police officers to know that by executing a search warrant comporting with existing constitutional standards that they would be violating any rights of the respondents and that they would be subject to paying attorneys' fees for merely performing their duties? At the time of the search, no law existed which proscribed the actions of petitioners in the execution of the warrant or made them liable for attorneys' fees for obeying a court order. The instant case is very much different than the *Bradley* situation since the school board in *Bradley* was not conforming to well known constitutional standards regarding non-discriminatory public education and knew or should have known that it was subject to the imposition of attorneys' fees for its actions. However, these petitioners were conforming to the constitutional standards known at the time and later

became embroiled in litigation characterized by the district court as being one of first impression. Clearly, these petitioners had the right to defend themselves in this case and to test the declaratory judgment by appeal without having imputed to them knowledge that their defense would result in the imposition of attorneys' fees under the private attorney general theory which by case history only applied when a defendant did not comport with well known constitutional guidelines.

Accordingly, it is clear that manifest injustice would result to these petitioners if the new law applied retrospectively to them.

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed and the case dismissed.

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November 9, 1977.

Respectfully submitted,

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